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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 502

RAYMOND DENNIS, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF AMICI CURIAE ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, AMALGAMATED CLOTHING WORKERS OF AMERICA, AMALGAMATED MEAT CUTTERS, AMERICAN FEDERATION OF TEACHERS, INTERNATIONAL TYPOGRAPHICAL UNION, NATIONAL FARMERS UNION, TRANSPORT WORKERS UNION, UNITED AUTOMOBILE WORKERS, AND UNITED PACKINGHOUSE WORKERS

MORRIS E. LASKER
WILLIAM B. GOULD
280 Park Avenue
New York, N. Y.

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y.
Attorneys for American Civil Liberties Union

JACOB SHEINKMAN
15 Union Square West
New York, N. Y.
Attorney for Amalgamated Clothing Workers

JOSEPH M. JACOBS
201 N. Wells Street
Chicago, Illinois
Attorney for Amalgamated Meat Cutters

JOHN LIGTENBERG
134 N. La Salle St.
Chicago, Illinois
Attorney for American Federation of Teachers

GERHARD P. VAN ARKEL
1730 K St., N.W.
Washington, D. C.
Attorney for International Typographical Union

CHARLES F. BRANNAN
Farmers Building
Denver, Colorado
Attorney for National Farmers Union

JOHN F. O'DONNELL
501 Fifth Avenue
New York, N. Y.
Attorney for Transport Workers Union

JOSEPH L. RAUH, JR.
1625 K St., N.W.
Washington, D. C.
Attorney for United Automobile Workers

EUGENE COTTON
105 W. Adams St.
Chicago, Illinois
Attorney for United Packinghouse Workers

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In the

Supreme Court of the United States

October Term, 1965

No. 502

Raymond Dennis, *et al.*,

Petitioners,

—v.—

United States of America,

Respondent.

BRIEF AMICI CURIAE ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, AMALGAMATED CLOTHING WORKERS OF AMERICA, AMALGAMATED MEAT CUTTERS, AMERICAN FEDERATION OF TEACHERS, INTERNATIONAL TYPOGRAPHICAL UNION, NATIONAL FARMERS UNION, TRANSPORT WORKERS UNION, UNITED AUTOMOBILE WORKERS, AND UNITED PACKINGHOUSE WORKERS

Interest of Amici*

The American Civil Liberties Union is a private, nonpartisan organization engaged solely in the preservation and defense of the Bill of Rights. The National Farmers Union is an independent association of family farmers within the United States. The Amalgamated Clothing Workers, Amalgamated Meat Cutters, American Federation of Teachers, International Typographical Union,

* This brief is filed with the consent of the parties. The letters of consent have been filed with the Clerk of the Court.

Transport Workers Union, United Automobile Workers, and United Packinghouse Workers are international trade unions affiliated with the labor federation known as the AFL-CIO.

Each of the amici believe that the constitutionality of Section 9(h) of the Taft-Hartley Act, the statute upon which the convictions in this case rest, is seriously in doubt. That statute, prior to its repeal in 1959, foreclosed a trade union's access to the services of the National Labor Relations Board if its officers did not file affidavits of non-membership or affiliation with the Communist Party.

Amici are especially interested in this case because they are opposed to government-imposed loyalty tests, both in general and as a pre-requisite for holding office or employment in a private organization. They are opposed in particular to such tests as a condition for the receipt of a benefit otherwise made freely available by statute.

It is, of course, a matter of public knowledge that the International Union of Mine, Mill and Smelter Workers, with which each of the petitioners is or was affiliated as an officer or employee, was expelled from the CIO (with which the Clothing Workers, the Transport Workers, the Automobile Workers and the Packinghouse Workers were then affiliated) in 1949 because it was found by the appropriate agencies of that body to be dominated by members of the Communist Party. That, however, was a decision freely arrived at after open debate by a private association whose members and officers, responsible for the association's integrity, concluded that such domination was inconsistent with the principles of free trade-unionism. The fact that that kind of decision may be made and acted upon by a private association is no justification in law or policy

for similar decisions to be thrust upon it involuntarily by the power of the government.

In essence, it is the belief of each of the amici that a mature trade union movement is capable of determining its own internal policies without the kind of governmental compulsion reflected either in Section 9(h) or in its successor statute, Section 504 of the Labor-Management Reporting and Disclosure Act, which was held unconstitutional in *United States* v. *Brown*, 381 U. S. 437 (1965).

Amici further believe that the use of the conspiracy doctrine in this case presents several issues which warrant review by the Court.

Since the 1806 *Philadelphia Cordwainers'* decision by Recorder Levy, and down through *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229 (1917); *Lawlor* v. *Loewe*, 235 U. S. 522 (1915) (The Danbury Hatters); *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418 (1911); and *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443 (1921), the conspiracy concept has been invoked to thwart union growth and effectiveness and to punish persons who have not directly participated in the activity alleged to be criminal.

This is not just a matter of history. Within recent years the Southern leadership of the Textile Workers Union of America was indicted for "conspiracy" in connection with strike violence in Henderson, North Carolina, *Walker et al.* v. *State*, 251 N. C. 465, 112 S. E. 2d 61, cert. den. 364 U. S. 832 (1960); the International Ladies Garment Workers Union was sued when some local strikers and local officials allegedly burned a struck plant in Hillsboro, North Carolina; and until reversed, the Labor Board during the 1950's had

a doctrine which punished all strikers for the unlawful conduct of any picketer. See *ILG* v. *BVD*, 237 F. 2d 545 (D. C. Cir., 1956).[1]

The labor movement, in short, has first hand knowledge that "conspiracy" is an "elastic, sprawling and pervasive offense", that "the looseness and pliability of the doctrine presents inherent dangers", that a conspiracy charge imposes "an especially difficult situation for the defendant", and that the prosecution chooses the conspiracy indictment "chiefly to get procedural advantages to ease the way to conviction". *Krulewitch* v. *United States*, 336 U. S. 440 at 445, 449, 453, 457 (1949) (Mr. Justice Jackson concurring).

Questions Presented

This brief is restricted to the following questions:

1. Whether, in light of *United States* v. *Brown*, 381 U. S. 437 (1965), Section 9(h) of the Taft-Hartley Act is unconstitutional.
2. Whether in this conspiracy prosecution the trial court erred in:
   a. excluding evidence favorable to the defendants; and
   b. incorrectly instructing the jury on the reliability of government witnesses.

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[1] The Mine-Mill Workers itself has been subjected to a series of acts by the federal government intended to thwart its effectiveness. In addition to the case at bar, see *Jencks* v. *United States*, 353 U. S. 657 (1957); *Leedom* v. *International Union of Mine, Mill & Smelter Workers*, 352 U. S. 145 (1956); *Travis* v. *United States*, 247 F. 2d 130 (10th Cir., 1957); *International Union of Mine, Mill & Smelter Workers* v. *Subversive Activities Control Board*, No. 17135, D. C. Cir. (pending).

Statement of the Case

The petitioners, all of whom were or had been officers or staff employees of the International Union of Mine, Mill and Smelter Workers, were indicted in 1956 for conspiring to defraud the United States government in violation of the fraud clause of the general conspiracy statute, 18 U. S. C. 371. The gravamen of the indictment charged that petitioners conspired to defraud the government by falsely denying that they were members of or affiliated with the Communist Party, as required by Section 9(h) of the Taft-Hartley Act, repealed in 1959. The affidavits in question were filed from 1949 to 1955. The testimony at trial concerned acts by individual defendants over a period of seven years and in such diverse locations as Cleveland, Ohio, Bessemer, Alabama, and Denver, Colorado. At least one of the government witnesses was a co-conspirator whose nolo contendere plea was then under advisement.

Petitioners' convictions at their first trial in 1959 were reversed on appeal. *Dennis* v. *United States*, 302 F. 2d 5 (10th Cir., 1962). Their subsequent conviction on retrial was affirmed 346 F. 2d 10 (10th Cir., 1965). This brief is filed in support of a petition for certiorari to review that affirmance.

Reasons for Granting the Writ

1. Section 9(h) of Taft-Hartley Act, 29 U. S. C. 159(h), had "conditioned a union's access to the National Labor Relations Board upon the filing of affidavits by all of the union's officers attesting that they were not members of or affiliated with the Communist Party." *United States* v. *Brown*, 381 U. S. 437 (1965).

In 1959, Congress enacted the Labor-Management Reporting and Disclosure Act (73 Stat. 519), Section 504 of which "was enacted to replace Section 9(h) of the Taft-Hartley Act." *United States* v. *Brown, supra,* at 439. Section 504 made it a crime for a member of the Communist Party to serve as an officer or as an employee of a labor union. By Section 201(d) of the Act, Section 9(h) of Taft-Hartley was simultaneously repealed.

> "Section 504 [of the Act of 1959] was designed to accomplish the same purpose as Section 9(h), but in a more direct and effective way. H.R. Rep. No. 741, 86th Cong. 1st Sess., p. 33; H.R. Rep. No. 1147, 86th Cong. 1st Sess., p. 36." *United States* v. *Brown, supra,* at 439, n. 2.

In 1961 Archie Brown, a member of the Executive Board of Local 10 of the International Longshoremen's and Warehousemen's Union, was indicted and convicted for violating Section 504. His conviction was reversed by the Court of Appeals for the Ninth Circuit, sitting en banc, on the ground that Section 504 violated the First and Fifth Amendments to the Constitution. This Court granted certiorari and affirmed the reversal of the conviction on the ground that Section 504 was unconstitutional as a Bill of Attainder. We contend here that the Court's conclusion in *Brown* that Section 504 of the 1959 Act was "enacted to replace Section 9(h) of the Taft-Hartley Act," and "was designed to accomplish the same purpose as Section 9(h)," in conjunction with its holding that Section 504 was unconstitutional, compels the conclusion that Section 9(h) of Taft-Hartley is constitutionally invalid.

Mr. Chief Justice Warren expressed the basis for the unconstitutionality of Section 504 in the following language:

"The statute does not set forth a generally applicable rule declaring that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party." *United States* v. *Brown, supra,* at 450.

This Court's reasoning in *Brown* applies with equal vigor to the instant case. With Section 9(h), as with Section 504, the Constitution's proscription of bills of attainder has been violated.

Second, this Court in *Brown* severely eroded the foundation of *American Communications Association* v. *Douds,* 339 U. S. 382 (1950), which upheld the constitutionality of Section 9(h), by finding that its reading of *United States* v. *Lovett,* 328 U. S. 303 (1946), was erroneous:

"We think that the Court in *Douds* misread *United States* v. *Lovett* when it suggested, 339 U. S. at 413, that that case could be distinguished on the ground that the sanction there imposed was levied for purely retributive reasons." *United States* v. *Brown, supra,* at 460.

Since the *Douds'* view that the absence of retribution in 9(h)—that is, the absence of the application of that provision to former members of the Communist Party—was determinative of the question whether 9(h) was puni-

tive, has now been rejected, the conclusion that a very significant portion of the *Douds* rationale is mistaken, or at best irrelevant, must follow. For it was the very absence of this kind of retribution in 9(h) which permitted *Douds* to avoid this Court's previous decisions and thus leave that provision intact. It is particularly important here, of course, that the treatment by the *Douds* decision of both *Lovett* and the question of retribution took place within the discussion of Section 9(h)'s constitutionality under the Bill of Attainder Clause.

Third, though this Court in *Brown* distinguished *Douds* as "not necessarily controlling," pointing out that under Section 9(h) Communist Party members could escape from the specified class simply through resignation, it nevertheless left open to attack the weight accorded this factor in *Douds:*

> "We do not read either opinion [*Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, or *Douds*] to have set up inescapability as an absolute pre-requisite to a finding of attainder. Such an absolute rule would have flown in the face of explicit precedent, *Cummings* v. *Missouri,* 4 Wall. 277, 324, as well as the historical background of the constitutional prohibition." *United States* v. *Brown, supra,* at 457, n. 32.

Fourth, it should be noted that this Court, in striking down Section 504, viewed its purpose as "preventive" and similar to those of a number of English bills of attainder. This Court said that both the former and the latter were the result of legislative judgments " . . . based largely on past acts and associations . . . that a given person or group was likely to cause trouble (usually, overthrow the govern-

ment) and therefore inflicted deprivation upon that person or group in order to keep them from bringing about the feared event." *United States* v. *Brown, supra,* at 458-459. Not only does this description perfectly fit Section 9(h), but the Court also suggested that Section 9(h) as construed in *Douds,* Section 504, and several early English and American bills of attainder, had similar legislative histories. *United States* v. *Brown, supra,* at 458-460. Truly, Section 9(h) is the ". . . legislative punishment, of any form or severity, of specifically designated persons or groups" to which this Court pledged unceasing hostility in *Brown.*

Fifth, four Justices of this Court subscribe to the following viewpoint articulated in Mr. Justice White's dissenting opinion in *Brown:*

> "*American Communications Assn.* v. *Douds,* 339 U. S. 382, which upheld the predecessor statute to §504 is obviously overruled . . . The Bill of Attainder Clause now forbids Congress to do precisely what was validated in Douds." *United States* v. *Brown, supra,* at 464-465.

Finally, we also urge that the Ninth Circuit's holding in *Brown* v. *United States,* 334 F. 2d 488 (9th Cir., 1965) provides a further ground upon which these convictions should be reviewed and reversed. More precisely, it is our position that Section 9(h) is an unconstitutional restraint on freedom of association and that, as was said by the Ninth Circuit in *Brown,* ". . . the relationship between the conduct or status punished and the evil intended here to be prevented is not sufficiently close or substantial to meet the requirements of either the First or Fifth Amendments . . ." 334 F. 2d at 496. Cf. *Aptheker* v. *Secretary*

of State, 378 U. S. 500 (1964); *Noto* v. *United States*, 367 U. S. 290 (1961). It is our belief that regardless of whether *Brown* can be said to overrule *Douds*, when two provisions such as Sections 504 and 9(h) are so closely related in purpose and effect, fairness and the obvious advantages of clarity require the conclusion that certiorari be granted to review the convictions below.

2. In a conspiracy indictment concerning the actions of fourteen defendants (some known Communists) covering a seven-year span and the geographical limits of the United States, it is essential for due process requirements that (a) all evidence favorable to the defendants be introduced before the jury and that (b) the jury be instructed on the reliability of the government witnesses. The record in this case indicates a failure in both respects.

a. The issue before the jury in this case was whether petitioners had decided to file the 9(h) affidavits as a result of a conspiracy by the Communist Party (as alleged by the government) or as a result of trade union necessity determined freely, openly and democratically by the membership (as contended by the defendants). The trial court permitted wide latitude in the testimony of the government in this regard, but cut off and precluded the jury's consideration of the defendants' testimony on this crucial issue of fact. The defendants below sought to controvert the inference of "parallelism" between Mine-Mill and Communist Party compliance policies by showing "parallelism" between Mine-Mill and many other trade unions. Defendants offered a certified list compiled by the National Labor Relations Board showing when compliance was effected by labor organizations. The accuracy and authenticity of this list was unchallenged, but the court sustained the prosecu-

tion's objection to its admissibility. The correctness of this exclusion in a mass conspiracy trial raises important due process considerations.

b. Some of the government's witnesses were former union officials and "accomplices". Prosecution witness Lawrence, one of the fourteen indicted defendants, had pleaded nolo contendere prior to trial. He was an important witness, testifying to events in Bessemer, Alabama.

The defense requested a charge that "accomplice testimony . . . be received with the greatest care and caution." The trial judge refused to so charge.

The Court of Appeals affirmed the trial court on the ground that the instruction cautioning the jury with respect to the testimony of former Communist Party members and "so-called informers" was sufficient to caution the jury concerning the treatment to be accorded the testimony of these witnesses. But this charge to the jury emphasized in closing that "A witness who is a former member of the Communist Party or an informer or who by reason of interest, hostility, bias or hope of reward might be induced to give false testimony may nevertheless testify accurately and truthfully. If you find that such witness has testified truthfully, then such testimony is as good as the truth testified from any other source."

Whether, in the context of a conspiracy trial, the refusal to grant a cautionary "accomplice" instruction is excused because this other cautionary instruction, based on quite different grounds, is given, raises important due process considerations.

CONCLUSION

For the reasons stated above, we urge that certiorari be granted.

Respectfully Submitted

MORRIS E. LASKER
WILLIAM B. GOULD
280 Park Avenue
New York, N. Y.

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y.
Attorneys for American Civil Liberties Union

JACOB SHEINKMAN
15 Union Square West
New York, N. Y.
Attorney for Amalgamated Clothing Workers

JOSEPH M. JACOBS
201 N. Wells Street
Chicago, Illinois
Attorney for Amalgamated Meat Cutters

JOHN LIGTENBERG
134 N. LaSalle Street
Chicago, Illinois
Attorney for American Federation of Teachers

GERHARD P. VAN ARKEL
1730 K St., N.W.
Washington, D. C.
Attorney for International Typographical Union

CHARLES F. BRANNAN
Farmers Building
Denver, Colorado
Attorney for National Farmers Union

JOHN F. O'DONNELL
501 Fifth Avenue
New York, N. Y.
Attorney for Transport Workers Union

JOSEPH L. RAUH, JR.
1625 K St., N.W.
Washington, D. C.
Attorney for United Automobile Workers

EUGENE COTTON
105 W. Adams St.
Chicago, Illinois
Attorney for United Packinghouse Workers